

Tobacco Products Tax Guidelines And Rules

These guidelines and rules are published by the Department of Taxation (“TAX”) to provide guidance to wholesale dealers and to those retail dealers who purchase untaxed product from out-of-state wholesale dealers of cigars, smokeless tobacco, pipe tobacco and roll-your-own tobacco regarding the tobacco products tax that takes effect on March 1, 2005. The new tax was provided for by House Bill 5018 (Chapter 3, 2004 Special Session I). House Bill 5018 provides that the development and publication of these guidelines and rules is exempt from the provisions of the Administrative Process Act (*Va. Code* § 2.2-4000, *et seq.*). TAX has worked with affected dealers to develop these guidelines and rules. As necessary, additional guidelines and rules will be published and posted on TAX’s web site, www.tax.virginia.gov.

Tobacco Products

Tobacco products include the following:

- Cigars — any roll of tobacco wrapped in leaf tobacco or in any substance containing tobacco (other than any roll of tobacco that is a cigarette).
- Smokeless tobacco —
 - o Snuff — any finely cut, ground, or powdered tobacco not intended to be smoked.
 - o Chewing tobacco — any leaf tobacco not intended to be smoked.
- Pipe tobacco — any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco to be smoked in a pipe.
- Roll-your-own tobacco — any tobacco which, because of its appearance, type, packaging, or labeling, is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes.

Cigarettes are not subject to the tax on tobacco products. Cigarettes are any roll of tobacco wrapped in paper or in any substance not containing tobacco, and any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette.

Tobacco Products Tax

In general, the tax will be imposed on wholesale dealers located within the Commonwealth that sell tobacco products to retail dealers or institutional, commercial or industrial users located within the Commonwealth. The tax will be imposed at a rate of 10 percent of the sales price charged by the wholesale dealer.

Chain store distribution centers that distribute tobacco products to their stores for sale at retail will be deemed to be wholesale dealers selling to retail dealers and the tax will be imposed at a rate of 10 percent of the purchase price paid by the distribution center.

In the case of a retail dealer located within the Commonwealth that purchases tobacco products from a wholesale dealer located outside the Commonwealth, the tax will be imposed on the retail dealer at a rate of 10 percent of the purchase price paid by the retail dealer. The retail dealer, however, is not required to collect and remit the tax if the out-of-state wholesale dealer is registered to collect and remit the tax.

The tax shall not apply to any sale or purchase of tobacco products in interstate or foreign commerce, or to the federal government, its agencies and instrumentalities that, under provisions of the United States Constitution, Virginia is prohibited from taxing.

Wholesale and Retail Dealers

A “wholesale dealer” is any person who sells tobacco products at wholesale to retail dealers or institutional, commercial or industrial users. A “retail dealer” is any person other than a wholesale dealer who sells or offers any tobacco products for sale.

Sales Price and Purchase Price

“Sales price” means the total amount for which tobacco products are sold, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the dealer, without any deduction there from on account of the cost of the property sold, the cost of materials used, labor or service costs, losses or any other expenses whatsoever. “Sales price” does not include any cash discount allowed and taken or finance charges, carrying charges, service charges or interest from credit extended on sales of tobacco products. “Purchase price” means the same as sales price but applies to the total price paid for tobacco products.

In the case of a buyer and seller that are affiliated entities, the sales price shall be the greater of the sales price established by the parties or the manufacturer's list price for the tobacco products increased by 10.5%. The 10.5% represents a typical markup in the industry. In its sole discretion, TAX may adjust this markup from time to time with prior notification to all registered dealers subject to the tax.

“Affiliate” means an individual or business that controls, is controlled by, or is under common control with another individual or business. A person controls an entity if the person owns, directly or indirectly, more than 10 percent of the voting securities of the entity. For the purposes of this definition “voting security” means a security that (i) confers upon the holder the right to vote for the election of members of the board of directors or similar governing body of the business or (ii) is convertible into, or entitles the holder to receive, upon its exercise, a security that confers such a right to vote. A general partnership interest shall be deemed to be a voting security.

Example 1:

A manufacturer sells 1,000 packages of tobacco products with a list price of \$1 each to a wholesale dealer located in Virginia for \$1,000 on March 15, 2005. The wholesale dealer resells the 1,000 packages to a retail dealer located in Virginia for \$1,500 in April 2005. The wholesale dealer's return due May 10, 2005 will include the \$1,500 resale price and an associated tax liability of \$150.

Example 2:

On a two-for-one promotion, a manufacturer sells 2,000 packages of tobacco products with a list price of \$1 each to a wholesale dealer located in Virginia for \$1,000 on March 15, 2005. The wholesale dealer resells the 2,000 packages to a retail dealer located in Virginia for \$1,500 in April 2005. The wholesale dealer's May 2005 return will include the \$1,500 resale price and a tax liability of \$150.

Registering to Collect the Tobacco Products Tax

Every wholesale and retail dealer liable for the tobacco products tax must register with TAX. Registration forms are available on TAX's web site, www.tax.virginia.gov. TAX will issue a certificate to each dealer evidencing this registration. Each wholesale dealer must provide a copy of this certificate to each retail dealer located in the Commonwealth to whom it sells tobacco products. Out-of-state wholesale dealers may voluntarily register with TAX to file monthly returns regarding their sales to retail dealers located within the Commonwealth and to remit the tax due on these sales. Upon the termination of the registration of any voluntarily registered wholesale dealer, the wholesale dealer shall not sell any tobacco products to any retail dealer prior to providing the retail dealer with notification of the termination of its registration.

A retail dealer that purchases tobacco products exclusively from a wholesale dealer registered with TAX is not required to register with TAX, file a monthly return or to pay the tax regarding these purchases so long as

- 1) it has obtained a copy of the wholesale dealer's registration certificate;
- 2) it has not been notified by the wholesale dealer or TAX that the registration has been terminated; and
- 3) each invoice received from the wholesale dealer reflects that the tobacco products tax due regarding the products listed on the invoice will be paid by the wholesaler by the wording “Virginia Tobacco Products Tax” followed by the amount of the tax.

A retail dealer that purchases any tobacco products

- 1) without obtaining a copy of the wholesale dealer's registration certificate,
- 2) after being notified by the wholesale dealer or TAX that the registration has been terminated, or
- 3) without receiving an invoice from the wholesale dealer reflecting that the tobacco products tax due regarding the products listed on the invoice will be paid by the wholesaler by the wording “Virginia Tobacco Products Tax” followed by the amount of the tax, is required to register with TAX, file a monthly return and pay the tax regarding such purchases.

Filing of Monthly Tax Returns

The tobacco products tax takes effect on March 1, 2005. Beginning in April 2005, wholesale and retail dealers liable for the tax will file monthly returns no later than the tenth of each month concerning their sale or purchase of tobacco products during the preceding month. The tax due on tobacco products sold or purchased in the preceding month will be paid at the time the return is filed. A return must be filed by each registered wholesale and retail dealer each month, even if no tax is due for that month.

Dealers will also be required by TAX to complete and retain detailed schedules supporting any adjustments taken on monthly returns, including but not limited to:

- Previously taxed tobacco products that have been returned to the manufacturer.
- Previously taxed tobacco products that have been exchanged for untaxed tobacco products with the manufacturer.
- Previously taxed products sold to other states.
- Exempt sales.
- Sales or purchases of previously untaxed products.

Forms and schedules are available on TAX's web site, www.tax.virginia.gov.

Examples

Example 1:

A wholesale dealer located in Virginia and other states sells tobacco products to retail dealers located in Virginia and other states. The wholesale dealer must

- 1) register with TAX;
- 2) provide a copy of its registration certificate to each retail dealer located in Virginia to whom it sells tobacco products;
- 3) file monthly returns concerning its sale of tobacco products to retail dealers located in Virginia during the preceding month; and
- 4) pay the tax due on such sales at the time the return is filed.

Example 2:

A chain store distribution center located in Virginia distributes tobacco products to its stores located in Virginia and other states for sale at retail. The chain store distribution center must

- 1) register with TAX;
- 2) file monthly returns concerning its purchases of tobacco products for distribution to its Virginia retail stores during the preceding month; and
- 3) pay the tax due on such purchases at the time the return is filed.

Example 3:

A retail dealer located in Virginia buys tobacco products exclusively from a wholesale dealer. The retail dealer

- 1) has obtained a copy of the wholesale dealer's registration certificate issued by TAX;
- 2) has not been notified by the wholesale dealer or TAX that the registration has been terminated; and
- 3) each invoice received from the wholesale dealer reflects that the tobacco products tax due regarding the products listed on the invoice will be paid by the wholesaler by the wording "Virginia Tobacco Products Tax" followed by the amount of the tax.

Regardless of whether the wholesale dealer is located in Virginia or another state, the retail dealer is not required to register with TAX, file a monthly return or to pay the tax regarding these purchases.

Example 4:

A retail dealer located in Virginia buys tobacco products exclusively from a wholesale dealer located in another state. The wholesale dealer has not registered with TAX. The retail dealer must

- 1) register with TAX;
- 2) file monthly returns concerning its purchases of tobacco products during the preceding month; and
- 3) pay the tax due on such purchases at the time the return is filed.

Example 5:

A retail dealer located in Virginia buys tobacco products from different wholesale dealers located in Virginia and other states. Some out-of-state wholesale dealers are registered with TAX, some are not. The retail dealer must

- 1) register with TAX;
- 2) file monthly returns concerning its purchases of tobacco products during the preceding month; and
- 3) pay the tax due on such purchases at the time the return is filed.

The monthly return must list all tobacco products purchased with the exception of purchases where the retail dealer

- 1) has obtained a copy of the wholesale dealer's registration certificate issued by TAX;
- 2) has not been notified by the wholesale dealer or TAX that the registration has been terminated; and
- 3) each invoice received from the wholesale dealer reflects that the tobacco products tax due regarding the products listed on the invoice will be paid by the wholesaler by the wording "Virginia Tobacco Products Tax" followed by the amount of the tax.

Floor Tax

As a part of TAX's implementation of the September 1, 2004, cigarette tax rate increase, wholesale dealers were required to remit a floor tax on every pack of cigarettes bearing an old stamp on the date of the rate increase. There will be **no** floor tax associated with the implementation of the tobacco products tax.

Recordkeeping

Taxpayers must retain records and documents substantiating all information contained on each tobacco products tax return, including records of purchases, receipts, inventories, storage, shipping, delivery and sales of tobacco products, for a period of three years from the required date for filing each return. Such records and documents must be available during regular business hours for inspection by the Tax Commissioner or his duly authorized agents. Persons violating the provisions of this section are guilty of a Class 2 misdemeanor under *Va. Code* § 58.1-103.

Each invoice issued by a wholesale dealer subject to the tax must prominently reflect that the tobacco products tax due regarding the products listed on the invoice will be paid by the wholesaler by the wording "Virginia Tobacco Products Tax" followed by the amount of the tax.

Penalties for Violating Tobacco Products Tax Law

Any person subject to the tobacco products tax who fails to file a return or pay the full amount of the tax due will be subject to a penalty equal to five percent of the tax due if the failure is for not more than one month, with an additional two percent for each additional month, or fraction thereof, during which the failure continues, not to exceed 20 percent in the aggregate. In no case, however, will the penalty be less than \$10 and the minimum penalty will apply whether or not any tax is due for the period for which such return was required. TAX has, in its discretion, the authority to waive these penalties.

Any person subject to the tax who files a false or fraudulent return with willful intent to defraud the Commonwealth, or willfully fails to file a return with the intent to defraud the Commonwealth, will be subject to a penalty equal to 50 percent of the tax due. It will be prima facie evidence of intent to defraud the Commonwealth when any taxpayer reports sales or purchases, as the case may be, at 50 percent or less of the actual amount.

Interest will accrue until the tax is paid. All penalties and interest will be payable by the taxpayer and collectible by TAX in the same manner as if they were a part of the tax imposed.

Appeals

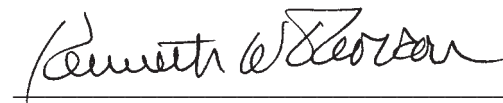
Taxpayers may appeal tobacco products tax issues to TAX using the administrative appeals process applicable to other state taxes administered by TAX set forth in *Va. Code* § 58.1-1821. Appeals of tobacco products tax issues are not subject to the Administrative Process Act.

Additional Information

These guidelines are available on-line in the Tax Policy Library section of TAX's web site, located at www.tax.virginia.gov. For additional information, please contact the **Office of Customer Services, Department of Taxation, P.O. Box 715, Richmond, VA 23218-0715** or call (804) 786-3503.

Approved:

Kenneth W. Thorson



Kenneth W. Thorson
Tax Commissioner
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